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11

12 UNITED STATES DISTRICT COURT
13 NORTHERN DISTRICT OF CALIFORNIA
14 SAN JOSE DIVISION
15

16 BROCADE COMMUNICATIONS SYSTEMS,
INC., a Delaware corporation; and FOUNDRY
17 NETWORKS, LLC, a Delaware limited liability
18 company,

19 Plaintiffs,

20 v.

21 A10 NETWORKS, INC., a California corporation;
22 LEE CHEN, an individual; RAJKUMAR JALAN,
an individual; RON SZETO, an individual; and
23 DAVID CHEUNG, an individual,

24 Defendants.
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Case No. 5:10-cv-03428-LHK

**DEFENDANTS A10 NETWORKS,
INC., LEE CHEN, RAJKUMAR JALAN,
AND RON SZETO'S NOTICE OF
MOTION AND MOTION TO DISMISS
COMPLAINT AND MEMORANDUM
OF POINTS AND AUTHORITIES IN
SUPPORT THEREOF**

Date: January 27, 2011
Time: 1:30 p.m.
Location: Courtroom 4, 5th Floor
Judge: Honorable Lucy H. Koh

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1 **NOTICE OF MOTION**

2 PLEASE TAKE NOTICE that on January 27, 2011, at 1:30 p.m., in Courtroom 4, located
3 on the 5th Floor of the above-entitled Court at 280 South First Street, San Jose, California, or as
4 soon thereafter as the matter may be heard before the Honorable Lucy H. Koh, each of the
5 Defendants Lee Chen, Rajkumar Jalan, and Ron Szeto will and hereby do move this Court for an
6 order dismissing all of the Plaintiffs' claims against them, and Defendant A10 Networks, Inc. moves
7 this Court for an order dismissing all claims against it, other than Plaintiffs' patent infringement
8 claims.

9 This motion is based upon this Notice of Motion and Memorandum of Points and
10 Authorities, other papers and pleadings on file, and on such additional argument and evidence as
11 may be presented to the Court at or prior to the hearing on this motion.

12 **MEMORANDUM OF POINTS AND AUTHORITIES**

13 **I. INTRODUCTION**

14 Plaintiffs Brocade Communications Systems, Inc. ("Brocade") and Foundry Networks, LLC
15 ("Foundry") filed this action against Defendants A10 Networks, Inc. ("A10") and four former
16 Foundry employees, Lee Chen ("Chen"), Rajkumar Jalan ("Jalan"), Ron Szeto ("Szeto"), and David
17 Cheung ("Cheung"). In their Complaint, Plaintiffs claim that the Defendants misappropriated
18 Foundry's trade secrets and other intellectual property and used that information to build and market
19 the A10 AX Series computer network devices that stand accused of infringing nine U.S. patents.
20 Brocade and Foundry also assert claims for breach of contract, intentional interference with
21 prospective economic advantage, intentional interference with contract, and unfair competition. The
22 patent infringement claims are asserted against all Defendants except for Cheung, while the breach
23 of contract claims are asserted against Messrs. Chen, Jalan, Szeto, and Cheung, but not A10. The
24 other claims are asserted against all Defendants. This motion to dismiss is brought by all Defendants
25 except Cheung.

26 The only products accused of patent infringement are the AX Series devices, but Plaintiffs'
27 Complaint fails to assert any facts whatsoever suggesting that any of Chen, Jalan, or Szeto
28 (collectively, the "Individual Defendants") could have committed any acts of patent infringement

1 with respect to those devices. That deficiency warrants dismissal of the patent infringement claims
2 (Counts 1 - 9) as to the Individual Defendants.

3 The Complaint is also fatally defective with respect to most of the other counts because the
4 applicable statutes of limitation ran well before the filing of this action. Specifically, the claims for
5 trade-secret misappropriation, breach of contract, intentional interference with prospective economic
6 advantage, and intentional interference with contract must be dismissed because they are time
7 barred. Even if each of the applicable statutes has not run, the Complaint nevertheless fails to allege
8 sufficient facts upon which relief can be granted against A10 and/or the Individual Defendants for
9 any of the state-law claims. Because those claims are not supported by enough facts to make them
10 plausible on their face, as required by *Ashcroft v. Iqbal*, 556 U.S. ___, 129 S. Ct. 1937, 1949 (2009),
11 they should be dismissed with respect to A10 and Messrs. Chen, Jalan, and Szeto. Moreover, certain
12 statutory and public policy pronouncements protecting an individual's rights to pursue a lawful
13 business in California make some of the allegations asserted in the breach of contract count
14 unenforceable—namely, the allegation concerning the inducement of employees to leave Foundry
15 and the allegation concerning solicitation of Foundry customers.

16 For these and other reasons, all discussed in more detail below, Messrs. Chen, Jalan, and
17 Szeto move to dismiss all of the claims that have been alleged against them, and A10 moves to
18 dismiss all but the asserted patent infringement claims.

19 **II. ARGUMENT**

20 **A. Applicable Pleading Requirements**

21 While Rule 8(a)(2) of the Federal Rules of Civil Procedure requires only that a complaint
22 include “a short and plain statement of the claim showing that the pleader is entitled to relief,”
23 dismissal is warranted if the complaint fails to “state a claim upon which relief can be granted.”
24 Fed. R. Civ. P. 12(b)(6). As the Supreme Court recently explained in *Ashcroft*, a claim should be
25 dismissed under Rule 12(b)(6) if the complaint fails to allege sufficient facts under Rule 8(a)(2) to
26 make the claim “plausible on its face.” *Ashcroft*, 129 S. Ct. at 1949; *see also SmileCare Dental*

27 / / /

28 / / /

1 *Group v. Delta Dental Plan of California, Inc.*, 88 F.3d 780, 783 (9th Cir. 1996).¹ A claim is
2 “plausible” if the factual allegations allow “the court to draw the reasonable inference that the
3 defendant is liable for the misconduct alleged.” *Ashcroft*, 129 S. Ct. at 1949.

4 While allegations of material fact are accepted as true and must be construed in the
5 nonmoving party’s favor, that is *not* the case for bare legal conclusions, unwarranted deductions of
6 fact, or unreasonable inferences, which alone cannot save a complaint from dismissal. *See Ashcroft*,
7 129 S. Ct. at 1951; *Caviness v. Horizon Cmty. Learning Ctr.*, 590 F.3d 806, 812 (9th Cir. 2010);
8 *Sinaltrainal v. Coca-Cola Co.*, 578 F.3d 1252, 1260 (11th Cir. 2009); *Sprewell v. Golden State*
9 *Warriors*, 266 F.3d 979, 988 (9th Cir. 2001); *Clegg v. Cult Awareness Network*, 18 F.3d 752, 754-55
10 (9th Cir. 1994).

11 As discussed in detail below, each of the Complaint’s fourteen counts fails to meet the
12 Supreme Court’s pleading standard and should be dismissed.

13 **B. The Patent Claims (Counts 1 - 9) Asserted Against the Individual**
14 **Defendants Are Fatally Deficient**

15 Section 271(a) of the patent statute prescribes the specific acts that constitute patent
16 infringement:

17 Except as otherwise provided in this title, whoever without authority
18 makes, uses, offers to sell, or sells any patented invention, within the
19 United States, or imports into the United States any patented invention
during the term of the patent therefor, infringes the patent.

20 35 U.S.C. § 271(a) (1994). The Federal Circuit has made clear that “only an affirmative act” (*e.g.*,
21 “making” all of the recited claim elements) “can give rise to the tort of direct infringement.” *See*,
22 *e.g.*, *Beverly Hills Fan Co. v. Royal Sovereign Corp.*, 21 F.3d 1558, 1570 n. 25 (Fed. Cir. 1994).²

23 _____
24 ¹ For procedural issues, such as the standards for evaluating a 12(b)(6) motion implicated by this
25 motion, the governing law is that of the appropriate regional circuit (here, the 9th Circuit), not the
Federal Circuit. *See, e.g., CoreBrace LLC v. Star Seismic LLC*, 566 F.3d 1069, 1072 (Fed. Cir.
2009).

26 ² “[T]he ‘patented invention’ means that *all* of its claimed elements must be united.” *Paper*
27 *Converting Mach. Co. v. Magna-Graphics Corp.*, 745 F.2d 11, 25 (Fed. Cir. 1984) (Nies, J.,
dissenting in part) (emphasis in original). “Thus, if the *claimed* invention comprises the elements A,
28 B, C and D, it is only the *combination* in its entirety that is protected. The making of the lesser
combination A, B and D falls short of direct infringement” *Id.* (emphasis in original).

1 Congress and the courts have expressly defined each of the enumerated acts of infringement:

- 2 • “makes”: “The right to make can scarcely be made plainer by
3 definition, and embraces the construction of the thing invented.”
4 *Bauer & Cie v. O’Donnell*, 229 U.S. 1, 10 (1913).
- 5 • “uses”: “The right to use is a comprehensive term and embraces
6 within its meaning the right to put into service any given
7 invention.” *Bauer & Cie*, 229 U.S. at 10-11.
- 8 • “offers to sell”/“sells”: “an ‘offer for sale’ or an ‘offer to sell’ . . .
9 [is] that in which the sale will occur before the expiration of the
10 term of the patent” (*see* 35 U.S.C. § 271(i)) under a “traditional
11 contractual analysis” *i.e.*, courts “loo[k] to contract law concepts to
12 find the required elements of a sale.” *See, e.g., Rotec Indus. Inc. v.*
13 *Mitsubishi Corp.*, 215 F.3d 1246, 1259 (Fed. Cir. 2000); *Ardco, Inc.*
v. Page, Ricker, Felson Mfg., 25 U.S.P.Q.2d 1382, 1384-85 (N.D.
Ill. 1992).
- “imports”: “imports into the United States extends only to that
party which is the actual ‘importer’ of the goods, and not to third
parties which play some role in the shipment of goods, but are not
the ‘importer.’” *Cybiotronics, Ltd. v. Golden Source Elecs., Ltd.*,
No. 99CV10522, 2001 WL 327826, at *8 (C.D. Cal. Feb. 26,
2001).

14 The Complaint, however, completely fails to allege that any of the Individual Defendants have
15 committed any of those recognized acts of patent infringement.

16 As to Messrs. Jalan and Szeto, for example, the Complaint alleges only that they “have been
17 deeply involved in the development of the Accused Products from the time they joined A10 to the
18 present” (Complaint at ¶ 27), and that they were “very familiar with [the] technology identified in
19 the Patents-in-suit” (*id.* at ¶ 28) and “developed the A10 products with full knowledge of the content
20 of the Patents-in-suit” (*id.*). None of those allegations, however, sounds in “patent infringement” as
21 codified in Section 271(a). Being “involved” in a product’s development, however “deeply,” even
22 while being “familiar” with and/or having “full knowledge” of a patent, falls far short of a
23 satisfactory allegation of patent infringement. The Complaint bears absolutely no facts that even
24 come close to alleging that either Jalan or Szeto affirmatively made (*i.e.*, constructed), used (*i.e.*, put
25 into service), contractually offered to sell or sold, or actually imported any of Plaintiffs’ “patented
26 inventions.”

27 So, too, with Mr. Chen. The Complaint merely alleges that Chen “had personal knowledge”
28 of the “Foundry technology disclosed and claimed in the Patents-in-suit” (*id.* at ¶ 21) and that Chen,

1 once armed with that knowledge, then “set out to build” A10 and “develop” the accused AX Series
2 products, “determin[ing] the features to include in the Accused Products with full knowledge of the
3 content of the Patents-in-suit” (*id.* at ¶¶ 23-24). However, as with Messrs. Jalan and Szeto, none of
4 that conduct attributed to Mr. Chen amounts to what the law recognizes as actionable “patent
5 infringement.”

6 Turning to Defendant A10, the Complaint alleges that A10 “manufactures, imports, sells,
7 and/or offers to sell products, including its AX Series products, that infringe the Patents-in-suit.”
8 (*See* Complaint at ¶ 50). Assuming, as A10 does, the sufficiency of that allegation, there is simply
9 no basis in fact or law for simply tacking liability for the same patent infringement onto A10’s
10 employees. While the Complaint does allege that Defendant Chen is an officer of A10 Networks
11 (*see id.* at ¶ 5 (Chen “is the founder and Chief Executive Officer of A10”)), it is only in rare
12 circumstances not even alleged to be present here (let alone actually present) that a corporate officer
13 may be personally liable for tortious acts committed by the corporation. The Complaint provides no
14 factual basis to support an allegation that Chen should be held personally liable for any of A10’s
15 alleged patent infringement. As the Federal Circuit recently explained:

16 [T]he “corporate veil” shields a company’s officers from personal
17 liability for direct infringement that the officers commit in the name of
18 the corporation, unless the corporation is the officers’ “alter ego”. *See*
19 *Wechsler v. Macke Int’l Trade, Inc.*, 486 F.3d 1286, 1295 (Fed. Cir.
20 2007). To determine whether corporate officers are personally liable
for the direct infringement of the corporation under § 271(a) requires
invocation of those general principles relating to piercing the corporate
veil. *Orthokinetics, Inc. v. Safety Travel Chairs, Inc.*, 806 F.2d 1565,
1579 (Fed. Cir. 1986).

21 *Wordtech Sys., Inc. v. Integrated Networks Solutions, Inc.*, 609 F.3d 1308, 1313 (Fed. Cir. 2010).
22 Plaintiffs’ Complaint is completely silent as to the validity of A10’s corporate status, and alleges no
23 facts that could possibly warrant piercing the corporate veil as to Mr. Chen.

24 In sum, Plaintiffs’ Complaint includes little more than factually unsupported, conclusory
25 statements that fail to state a claim for patent infringement against the Individual Defendants. *See*,
26 *e.g.*, *Sprewell*, 266 F.3d at 988; *Clegg*, 18 F.3d at 754-55. Plaintiffs’ patent-infringement claims
27 against the Individual Defendants (Counts 1 - 9) should, therefore, be dismissed.

28 / / /

1 **C. Plaintiffs’ Trade-Secret Misappropriation Claim (Count 10) Against**
2 **All Defendants Falls Outside the Statute of Limitations, is Factually**
3 **Unsupported, and Must Be Dismissed**

4 **1. The Trade Secret Misappropriation Claim Is Time Barred**

5 The California Uniform Trade Secrets Act (“CUTSA”) requires assertion of a trade-secret
6 claim “within three years after the misappropriation is discovered or by the exercise of reasonable
7 diligence should have been discovered.” Cal. Civ. Code § 3426.6. The three-year period begins to
8 run as soon as there is reason to suspect misappropriation that a reasonable investigation would have
9 revealed, even if no such investigation was done. *Memry Corp. v. Ky. Oil Tech.*, No. C-04-03843
10 RMW, 2007 U.S. Dist. LEXIS 73311 (N.D. Cal. Sept. 20, 2007) (*quoting Alamar Biosciences v.*
11 *Difco Labs.*, 40 U.S.P.Q.2d 1437, 1439-1440, 1996 U.S. Dist. LEXIS 18239 (E.D. Cal. 1996)). Of
12 particular importance here, “a continuing misappropriation constitutes a single claim.” Cal. Civ.
13 Code § 3426.6; *see Cadence Design Sys., Inc. v. Avant! Corp.*, 29 Cal. 4th 215, 227 (2002)
14 (“Plaintiffs’ claim for misappropriation of a trade secret against a defendant arises only once, when
the trade secret is initially misappropriated.”).

15 Plaintiffs’ trade-secret misappropriation claim is time barred because their Complaint alleges
16 a continuing scheme of misappropriation dating all the way back to 2004, some six years before they
17 filed this action. The Complaint essentially alleges that Foundry knew of the supposedly improper
18 conduct at the time it was happening. Specifically, the Complaint alleges that Messrs. Chen, Jalan,
19 and Szeto were all heavily involved in developing Foundry’s ServerIron products (Complaint at
20 ¶¶ 20, 25), and that “the Defendants embarked on a strategy to unlawfully leverage all aspects of
21 Plaintiffs’ confidential and proprietary information in order to form a ‘turn-key’ enterprise to
22 compete unfairly against the Plaintiffs in their unique market segment.” (*Id.* at ¶ 40.) Allegedly,
23 Mr. Chen had a position of “trust and confidence” at Foundry, yet started a directly competing
24 company—which became A10—before he left Foundry in 2004, and when he eventually exited
25 Foundry, he took Foundry trade secrets with him. (*Id.* at ¶¶ 20-23, 46.) The Complaint also alleges
26 that after Chen left Foundry, it was “common practice” for him “to regularly socialize at Silicon
27 Valley area restaurants and to frequently communicate by electronic mail with Cheung and other
28 Foundry and Brocade engineers (several of whom subsequently joined A10).” (*Id.* at ¶ 31.) Based

1 on the Complaint's allegations, Foundry was either clearly aware of the alleged misappropriation, or
2 had reason to suspect and investigate it, at that time. Under either test, the clock started to tick for
3 this claim in 2004. *Memry Corp.*, 2007 U.S. Dist. LEXIS at * 24-25.

4 Noticeably absent from the Complaint are any allegations that the Individual Defendants
5 either kept their alleged acts of misappropriation hidden from Foundry, that a reasonable
6 investigation at that time would not have revealed any misappropriation, or that Plaintiffs discovered
7 Foundry's former employees' allegedly wrongful acts less than three years ago. There is a reason
8 for those omissions: they would run counter to the entire flavor of the Complaint, which is built
9 around—and emphasizes over and over again—a scheme of allegedly wrongful acts that began even
10 before Mr. Chen left Foundry's employ in 2004. (*See, e.g.*, Complaint at ¶ 22-34.) The Complaint
11 acknowledges that A10 formally announced its AX Series product line “in and around late 2007” (*id.*
12 at ¶ 44), yet it stops there, never alleging that such announcement failed to mark the date when
13 Plaintiffs first learned of A10's or Messrs. Chen's, Jalan's, and Szeto's alleged misappropriation.

14 In view of the Complaint's allegations of an on-going wrongful scheme beginning in 2004,
15 the statute of limitations began to run at that time. “[S]ince what trade secret law protects (under the
16 UTSA and under the First Restatement of Torts) is not a series of arguably separate ‘properties’
17 owned by plaintiff, but a right to maintain the integrity of a confidential relationship, it is the first
18 known (or reasonably discoverable) breach of that relationship that creates the right to sue and thus
19 triggers the running of the statute of limitations.” *Intermedics, Inc. v. Ventritex, Inc.*, 822 F. Supp.
20 634, 653 (N.D. Cal. 1993). According to the Complaint, the statute was triggered over six years ago.

21 Furthermore, “once plaintiff knows or should know that a defendant who once was trusted
22 has shown, by any act of misappropriation, that he cannot be trusted, plaintiff should understand that
23 there is a risk that that defendant will commit additional acts of misappropriation” *Intermedics*,
24 822 F. Supp. at 654 (the CUTSA's statute of limitations begins to run once a “fracture in the
25 confidential relationship” was or should have been discovered). *Id.* The Complaint plainly alleges
26 that Foundry knew or should have known that its “trust and confidence” in Mr. Chen were fractured
27 in 2004 when he allegedly started a competing company, Raksha Networks (A10's predecessor),
28 while still working for Foundry (*see* Complaint at ¶ 22)), then left Foundry to join that company.

1 The Complaint also alleges that after Mr. Chen left Foundry in 2004, he poached “two of the best
2 engineers from Foundry.” (*Id.* at ¶¶ 24-26.) Thus, Foundry knew or should have known that its
3 confidential relationships with Messrs. Jalan and Szeto were irreparably fractured at that time.

4 Even if Foundry did not actually know about the alleged misappropriation at that time, it
5 surely should have. In the 2004-2005 timeframe, Foundry allegedly lost one of its co-founders,
6 Mr. Chen, and one key engineer after another, to A10. *See id.* at ¶ 5, 20-28. “California law
7 assumes that once a plaintiff knows or should know that a particular defendant cannot be trusted
8 with one secret, it is unreasonable for that plaintiff simply to assume that that defendant can be
9 trusted to protect other secrets.” *Intermedics*, 822 F. Supp. at 654. Thus, Foundry was on notice of
10 the alleged problem at that time, yet it waited five to six years before it took any action. For
11 example, after Mr. Chen left Foundry’s employ, Foundry should have asked its own employees
12 about their communications with A10 and Mr. Chen. *See Portney v. CIBA Vision Corp.*, No. SACV
13 07-0854 AG (MLGx), 2008 U.S. Dist. LEXIS 106676 (C.D. Cal. Dec. 24, 2008) (holding that statute
14 of limitations had expired because it was unreasonable for “a sophisticated businessperson” to fail to
15 verify that confidentiality provisions of agreement were fulfilled). Thus, the three-year statute of
16 limitations began to run for A10 and Messrs. Chen, Jalan, and Szeto no later than sometime in 2005.
17 Plaintiffs’ trade-secret claim, therefore, has been time barred for at least two years, and should be
18 dismissed with prejudice.

19 **2. Even if Timely Filed, Plaintiffs’ Trade-Secret Misappropriation**
20 **Claims Lack Sufficient Facts and Should Be Dismissed Under**
Rule 12(b)(6)

21 The Complaint contains numerous allegations about Messrs. Chen’s, Jalan’s, and Szeto’s
22 employment with Foundry, their importance to Foundry, their involvement with Foundry’s relevant
23 products, and the allegedly secret information that they acquired while working there. But a careful
24 reading of the Complaint reveals virtually no facts supporting the allegedly wrongful act, *i.e.*, that
25 the Individual Defendants and/or A10 misappropriated Foundry trade secrets. Under *Ashcroft*, a
26 valid Complaint must allege sufficient *facts* to make a claim plausible on its face, whereas Plaintiffs’
27 Complaint features only legal conclusions about Defendants’ alleged misappropriation. (*See, e.g.*,
28 Complaint at ¶¶ 23-24, 28, 40, 44-47, 49, and 126.) This Court should not treat conclusory

1 allegations as facts, or treat them as true. *Ashcroft*, 129 S. Ct. at 1949-51.

2 For example, the Complaint alleges, on information and belief, that Mr. “Chen set out to . . .
3 develop products (the “Accused Products”), such as the A10 AX Series network devices, that would
4 copy . . . the Foundry ServerIron products” (*id.* at ¶ 23), that (i) “A10 developed . . . its products
5 through the acquisition and use of Plaintiffs’ trade secrets” (*id.* at ¶ 24), (ii) “Jalan and Szeto used
6 the Foundry trade secrets, including Foundry’s source code, in the development of the A10
7 products” (*id.* at ¶ 28), (iii) “Defendants have engaged in schemes to misappropriate for A10’s use
8 Plaintiffs’ intellectual property” (*id.* at ¶ 40), and (iv) A10 “marketed its products by using Plaintiffs’
9 proprietary information” (*id.* at ¶ 49). Such bare allegations, however, provide no details about such
10 alleged schemes, copying, acquisition, development, or use of Plaintiffs’ alleged secrets, much like
11 the allegations rejected by the Supreme Court as conclusory in *Ashcroft*.

12 The Supreme Court’s *Ashcroft* opinion is instructive. While the Court’s opinion does not
13 directly quote the various “factual” statements from the Complaint that it ultimately rejected as
14 conclusory (*Ashcroft* at 1950-51), Justice Souter’s does:

15 Iqbal alleges that after the September 11 attacks the Federal Bureau of
16 Investigation (FBI) “arrested and detained thousands of Arab Muslim
17 men,” that many of these men were designated by high-ranking FBI
18 officials as being “of high interest,” and that in many cases, including
19 Iqbal’s, this designation was made ‘because of the race, religion, and
20 national origin of the detainees, and not because of any evidence of
21 the detainees involvement in supporting terrorist activity[.]’ The
22 complaint further alleges that Ashcroft was the “principal architect
23 of the policies and practices challenged,” and that Mueller “was
24 instrumental in the adoption, promulgation, and implementation of
25 the policies and practices challenged[.]” According to the complaint,
26 Ashcroft and Mueller ‘knew of, condoned, and willfully and
27 maliciously agreed to subject [Iqbal] to these conditions of
28 confinement as a matter of policy, solely on account of [his] religion,
race, and/or national origin and for no legitimate penological
interest”

24 (*Id.* at 1959 (Souter, J. dissenting) (citations omitted).) Like Iqbal’s allegations, Plaintiffs’
25 allegation are simply too conclusory to support their claims.

26 The Complaint’s allegations that Messrs. Jalan and Szeto took Foundry source code (an
27 alleged trade secret), and that A10’s AX Series products utilize software code copied or substantially
28 derived from Foundry’s code (*id.* at ¶¶ 28, 45-46), are no less conclusory than the allegations

1 rejected in *Ashcroft*. Plaintiffs try to bootstrap those allegations with the typical “on information and
2 belief” qualifiers (*id.*), but such boilerplate incantations cannot magically turn legal conclusions into
3 allegations of fact sufficient to satisfy Rule 8(a) and *Ashcroft*. On the contrary, qualifying such
4 allegations with the phrase “on information and belief” obviously means that the Plaintiffs lack
5 supporting facts, such as which computer programs—and which version(s) of such programs—
6 allegedly were taken and used, when they were taken, how they were taken, how much was taken,
7 how they were used, and how Plaintiffs know they were taken and used. *See Hutchens v. Alameda*
8 *County Social Servs. Agency*, No. C-06-06870 SBA, 2008 U.S. Dist. LEXIS 69429, at *12-13 (N.D.
9 Cal. Sept. 9, 2008) (“Pleading on information and belief is a desirable and essential expedient when
10 matters that are necessary to complete the statement of a claim are not within the knowledge of the
11 plaintiff *but he [or she] has sufficient data to justify interposing an allegation on the subject,*”
12 emphasis added, *quoting* 5 Charles Alan Wright & Arthur R. Miller, *Federal Practice and*
13 *Procedure* § 1224 (2d ed. 1990)). Facts, as opposed to legal conclusions, involve the “Five Ws” —
14 the who, what, when, where, and why—of a defendants’ wrongful actions that, when taken together,
15 lead to the legal conclusion. The allegations rejected in *Ashcroft* lacked such details, as do
16 Plaintiffs’ allegations here. The part of Plaintiffs’ claim describing Defendants’ allegedly wrongful
17 acts contains no Ws. If there were more facts to support Plaintiffs’ claims, they surely would have
18 asserted them, and therefore it is highly unlikely that the Complaint’s deficient allegations can be
19 fixed.

20 The Complaint’s basic allegation that A10 and Messrs. Chen, Jalan, and Szeto
21 misappropriated Plaintiffs’ trade secrets is grounded on little more than a suspicion that because A10
22 got to market with its AX Series products faster than Plaintiffs think it should have, A10 must have
23 used Foundry’s trade secrets. (*Id.* at ¶ 26.) *Ashcroft* requires more, *i.e.*, sufficient facts to show that
24 there is probably no alternate explanation for the effect that the Complaint alleges that the defendant
25 has caused. *Ashcroft*, 129 S. Ct. at 1951. In other words, the Complaint must plead enough facts
26 that, when taken as true, show causation. Contrary to the Complaint’s version of things, it is equally
27 plausible that A10 brought its accused AX Series to market through completely proper means,
28 including, for example, by independently engineering a new architecture design that could be

1 implemented quicker and without using any of Foundry’s alleged trade secrets. Significantly, the
2 Complaint pleads *no* facts that are inconsistent with such a scenario. Because this explanation is
3 completely consistent with getting a product to market within the timeframe alleged by Plaintiffs, the
4 Complaint fails to plead sufficient facts to show causation.

5 Indeed, upon careful consideration, the Complaint alleges little if anything more than
6 misappropriation by “inevitable disclosure” (*see, e.g.*, Complaint at ¶¶ 20-21, 25, 28-29, 32, 40-43,
7 and 48), a theory *not* recognized in California. *See, e.g., FLIR Sys., Inc. v. Parrish*, 174 Cal. App.
8 4th 1270, 1277 (2009) (“The doctrine of inevitable disclosure is not the law in California.”); *Lam*
9 *Research Corp. v. Deshmukh*, No. 05-353230, 2005 WL 3159685, 157 Fed. Appx. 26, 28 (9th Cir.
10 Nov. 29, 2005) (same). It is insufficient to merely allege a former employee’s access to trade secrets
11 and then ask the Court to infer that improper disclosure or use occurred. *Id.*

12 For these reasons, Plaintiffs’ trade-secret misappropriation claim should be dismissed with
13 respect to A10 and Messrs. Chen, Jalan, and Szeto.

14 **D. Plaintiffs Fail to State a Claim for Breach of Contract (Count 11) Against**
15 **the Individual Defendants, and Such Claim Is Time Barred**

16 The Complaint asserts breach of several provisions in the employment contracts between
17 Foundry and the Individual Defendants. (*See* Complaint, Exs. A and C-D.) Specifically, Plaintiffs’
18 allege that the Individual Defendants breached the following five contractual provisions: (1) “using
19 and disclosing” what the Complaint calls “Proprietary Information,” (2) failing to assign their
20 inventions, (3) engaging “in employment and/or business activities” for A10 while employed by
21 Foundry, (4) inducing Foundry employees to leave, and (5) soliciting Foundry’s customers and
22 clients. (*Id.* ¶ 138.) The breach of contract count, however, must be dismissed because the
23 Complaint fails to plead “enough facts to state a claim to relief that is plausible on its face.”
24 *Ashcroft*, 129 S. Ct. at 1960. In addition and in any event, the four-year statute of limitations ran on
25 each of these alleged breaches before the Complaint was filed.

26 / / /

27 / / /

28 / / /

1 **1. The Allegation of Using and Disclosing Proprietary Information Is**
2 **Insufficient and Time Barred**

3 The Individual Defendants allegedly signed contracts with Foundry under which they agreed
4 not to disclose or use Foundry's "Proprietary Information." (*See, e.g.*, Complaint, Ex. A at 1.) In a
5 circuitous fashion, however, the contracts define "Proprietary Information" as "trade secrets,
6 confidential knowledge, data or any other proprietary information" *Id.* To the extent that
7 Plaintiffs are claiming that the Individual Defendants breached their contracts by disclosing "trade
8 secrets," this portion of the allegation fails for the same reasons as the misappropriation of trade
9 secrets count fails. *See* Section II.C.2., *supra*. The Complaint fails to plead facts regarding what
10 alleged trade secrets were improperly disclosed, how and/or to whom they were improperly
11 disclosed, and to the extent the Complaint alleges that some Foundry-proprietary information was
12 improperly disclosed or used, it fails to allege facts supporting a claim that such information
13 qualifies as a trade secret.

14 To the extent that the Complaint contends that the Individual Defendants breached this
15 provision by using or disclosing one or more of the examples of "Proprietary Information" found in
16 the contract, *e.g.*, "inventions, mask works, trade secrets, ideas, processes, formulas . . ." (Complaint,
17 Ex. A at 1), these examples are equally vague. The Complaint provides no detail as to what the
18 Individual Defendants allegedly disclosed or used. For example, while the Complaint alleges that
19 "Proprietary Information" was used in Plaintiffs products, such as "design and technology . . .
20 software code, including source code written for the products . . ." (Complaint at ¶ 16), it is not clear
21 if the Complaint relies on these examples for this portion of the breach of contract count. Even if it
22 does, there are no allegations of what design, what technology, or what code was disclosed or used.
23 The Complaint further fails to allege to whom this "Proprietary Information" was disclosed or the
24 circumstances under which it was disclosed.

25 Similarly, the Complaint vaguely references "confidential information regarding . . .
26 customers and marketing" (*id.* at ¶ 17), but fails to allege specific facts or provide concrete
27 details of what is meant by this phrase. There are no allegations of what specific customers or what
28 part of their "confidential marketing" information was used or disclosed, how it was used or

1 disclosed, and what the effects of such use and disclosure were. Instead, the Complaint simply
2 alleges, in conclusory fashion, that the Individual Defendants “use[d] and disclos[ed] Foundry’s
3 Proprietary Information.” (*Id.* at ¶ 138.) The Federal Rules, as recently clarified in *Ashcroft*, require
4 substantially more facts to assert an actionable claim for breach of contract. Plaintiffs’ Eleventh
5 Claim for Relief therefore must be dismissed.

6 Moreover, Plaintiffs’ breach of contract claim is time barred based on the four-year statute of
7 limitations. Cal. Civ. Proc. Code § 337. For an alleged breach based on disclosing or using
8 proprietary information, the statute of limitations runs at the same time as any claim for trade secret
9 misappropriation. *Intermedics*, 822 F. Supp. at 644-46 (holding that the breach of a contract that
10 created a confidential relationship is treated like a CUTSA claim with respect to the statute of
11 limitations). Thus, the time within which Foundry could have sued expired four years after each
12 defendant left Plaintiffs’ employ. Plaintiffs allege that Mr. Chen left Foundry in September, 2004.
13 Plaintiffs are fully aware that Messrs. Jalan and Szeto left in 2004 and 2005,³ respectively. Thus,
14 Plaintiffs’ claims for breach of disclosing or using proprietary information against Messrs. Chen,
15 Jalan, and Szeto should be dismissed with prejudice.

16 2. The Failure to Assign Allegation Is Insufficient and Time Barred

17 The Complaint also fails to allege sufficient facts that any the Individual Defendants failed to
18 assign inventions to Foundry. The “assignment” language upon which Plaintiffs rely is automatic
19 and self-executing: “I hereby assign . . . all my right, title and interest in and to any and all
20 Inventions.” (Complaint, Ex. A. at 1 (¶ 3).) *See DDB Techs., L.L.C. v. MLB Advanced Media, L.P.*,
21 517 F.3d 1284, 1290 (Fed. Cir. 2008) (language to “hereby grant and assign” is an automatic
22 assignment). Thus, as a matter of law, Messrs. Chen, Jalan, and Szeto fully met their assignment
23 obligations to Foundry because they signed a contract containing a self-executing assignment. *SiRF*
24 *Tech., Inc. v. ITC*, 601 F.3d 1319, 1326 (Fed. Cir. 2010) (whether a contract provision works an

25
26 ³ The Complaint states that Mr. Chen departed Foundry’s employ in September 2004. (Complaint
27 at ¶ 20.) Although the Complaint does not allege when Messrs. Jalan and Szeto departed Foundry,
28 Plaintiffs know that they left Foundry in December 2004 and May 2005, respectively. Thus,
Plaintiffs cannot possibly amend this claim to state facts that would avoid the four-year statute of
limitations.

1 automatic assignment is a question of law). The Complaint states no facts to the contrary.

2 In any event, the allegations of breach (improper use and disclosure) are hopelessly vague
3 and insufficient. The Complaint fails to allege, for example, (i) what inventions the Individual
4 Defendants invented and failed to assign, (ii) when these unknown “inventions” were invented,
5 (iii) the circumstances under which Plaintiffs contend these unknown “inventions” were invented,
6 and which of the Individual Defendants invented them, and (iv) how and why, given the self-
7 executing language of the provision relied upon, these unknown “inventions” are not owned by
8 Plaintiffs. Instead, the Complaint only conclusorily alleges that the Individual Defendants “fail[ed]
9 to assign to Foundry all right, title and interest in and to any and all inventions made or conceived or
10 reduced to practice during the period of their employment with Foundry.” (Complaint at ¶ 138).
11 These allegations do not clear the *Ashcroft* hurdle and should be dismissed pursuant to
12 Rule 12(b)(6).

13 Moreover, given the self-executing nature of the relied-upon contractual language, the
14 assignment of the subject inventions had to occur during Messrs. Chen’s, Jalan’s, and Szeto’s
15 employment at Foundry. Having departed Foundry’s employ in the 2004-2005 timeframe, the
16 statute of limitations ran with respect to this claim no later than sometime in 2009, presenting an
17 independent basis for dismissing this part of the breach of contract claim, with prejudice.

18 **3. The Allegation of Engaging in Employment or Business Activities**
19 **for A10 While Still Employed by Foundry Is Insufficient and Time**
Barred

20 Without providing any details or facts to support the barest of conclusions, the Complaint
21 alleges that the Individual Defendants “engaged in employment and/or business activities for and on
22 behalf of A10 during their employment [with Foundry] without [Foundry’s] written consent.”
23 (Complaint at ¶ 138.) The problems with that conclusory allegation include failing to (i) identify
24 which Individual Defendant allegedly breached his contract with Foundry, (ii) define what is meant
25 by “employment and/or business activities,” (iii) explain how such activities were carried out, and
26 (iv) indicate when the allegedly improper activities occurred. Defendants and this Court are left to
27 guess at the myriad facts that might support this vague allegation.

28 / / /

1 Pursuant to Rules 8 and 12(b)(6), and as discussed in *Ashcroft*, this part of the breach of
2 contract claim fails. Moreover, given that Messrs. Chen and Jalan left Foundry in 2004, and
3 Mr. Szeto left Foundry's employ in 2005, this claim cannot be asserted because the four-year statute
4 of limitations has run, and therefore should be dismissed with prejudice. *See* Sections II.D.1.- 2.,
5 *supra*.

6 **4. The Allegations of Inducing Others to Leave and Soliciting Clients**
7 **and Customers Are Unenforceable, Insufficient, and Time Barred**

8 Each of the Individual Defendants' employment contracts with Foundry states (in pertinent
9 part):

10 I agree that during the period of my employment by the Company
11 I will not, without the Company's express written consent, engage
12 in any employment or business activity other than for the Company,
13 and for the period of my employment by the Company and for one (1)
14 year after the date of termination of my employment by the Company
I will not (i) induce any employee of the Company to leave the employ
of the Company or (ii) solicit the business of any client or customer of
the Company (other than on behalf of the Company).

15 *See, e.g.*, Complaint, Ex. A at 3 (¶ 7). Neither restriction, however, is enforceable and both are time
16 barred.

17 **a. The Anti-Inducement Provision is Unenforceable Under**
18 **California Law**

19 The Complaint alleges that Messrs. Chen, Jalan, and Szeto breached each part of this
20 provision. (Complaint at ¶ 138). Regarding part (i) of this provision—which asserts that the
21 Individual Defendants, after they left Plaintiffs' employ, induced other employees to leave—the
22 Complaint fails to allege enough facts to make such a claim plausible. The provision states that for
23 one year after the Defendant left, he would not “induce any employee of the Company to leave the
24 employ of the Company” (*Id.*, Ex. A at 3 (¶ 7).) While California courts may, under certain
25 circumstances, enforce a provision that prevents a former employee from soliciting company
26 employees (*see, e.g., Thomas Weisel Partners LLC v. BNP Paribas*, No. C 07-6198 MHP, 2010 U.S.
27 Dist. LEXIS 11626 (N.D. Cal. Feb. 9, 2010)), it is unclear what “induce” means here, and whether
28 the caselaw that has enforced clauses barring a former employee from soliciting remaining employees

1 to join the former employee's new place of work, apply to this contract which prevents the former
2 employee from "induc[ing]" a remaining employee to leave. (Complaint., Ex. A at 3 (¶ 7).)
3 Moreover, the only charge of improperly inducing employees to leave is made on "information and
4 belief." (*Id.* at ¶ 138.) These "information and belief" allegations show that Plaintiffs have no facts
5 upon which they can support this allegation, even if this provision were otherwise enforceable.

6 Moreover, the Complaint fails to identify a single person who was allegedly improperly
7 "induced" by any of the Individual Defendants to leave Foundry's employ. Regarding Mr. Chen, the
8 Complaint asserts "on information and belief" only, that he "recruited" Messrs. Jalan and Szeto (*id.*
9 at ¶ 25) but conspicuously omits any supporting facts. The Complaint fails to address when any
10 alleged wrongful activity occurred, and what was actually communicated by Chen that violated this
11 provision. Under *Ashcroft*, and the cases and authority cited and discussed in Section II.A., *supra*,
12 Plaintiffs' Complaint fails to allege sufficient *facts* supporting a claim that any of the individual
13 defendants *induced* a Foundry employee to leave, assuming "induce[ment] . . . to leave" is even
14 actionable.

15 Moreover, the statute of limitations bars this breach of contract claim against Messrs. Chen,
16 Jalan, and Szeto. Regarding Mr. Chen, the Complaint alleges that he left Foundry in September
17 2004. (*Id.* at ¶ 20.) Assuming the breach of inducing others to leave provision is enforceable at all,
18 it was only in effect for one year. Thus, the latest that this claim could have arisen concerning
19 Mr. Chen was September 2005. Thus, the four-year statute of limitations ran, at the latest, nearly a
20 year before Plaintiffs filed their Complaint. As for Messrs. Jalan and Szeto, while the Complaint
21 fails to plead when they actually left Foundry, Plaintiffs cannot assert this claim against them
22 because they know that at least five years have passed since either was employed by Foundry. Thus,
23 this part of the breach of contract claim against Messrs. Chen, Jalan, and Szeto must be dismissed
24 with prejudice.

25 **b. The Anti-Solicitation Provision is also Unenforceable**
26 **Under Applicable State Law**

27 The Complaint asserts that the Individual Defendants "solicited . . . Foundry's . . . customers
28 and clients for and on behalf of A10." (*Id.* at ¶ 138). However there are no facts in this Complaint to

1 support this conclusory allegation. For example, the Complaint fails to identify a single customer or
2 client, and fails to allege what was communicated to these unnamed customers and clients. Further,
3 there are no allegations in the Complaint that detail when this supposed solicitation occurred. Such
4 details would be key because this term, even if it were enforceable, was limited to one year after the
5 individual defendant left Foundry. Moreover, even if such details were alleged, this portion of
6 Plaintiffs' Complaint is still unenforceable pursuant to Business and Professions Code
7 Section 16600.⁴

8 In *Edwards v. Arthur Anderson*, 44 Cal. 4th 937 (2008), the California Supreme Court
9 recently invalidated a contractual provision that is very similar to the language at issue here. The
10 contract in *Edwards* prohibited the defendant from (i) providing services for any client on whose
11 account he had worked during the eighteen months prior to his termination, and (ii) soliciting any
12 client in the former employer's office. The court invalidated those provisions, explaining that the
13 purpose behind Section 16600 codified a settled policy in favor of open competition and employee
14 mobility, to ensure that every citizen retains the right to pursue lawful employment and an enterprise
15 of his or her choice. See *Edwards, supra*, at 946; *D'Sa v. Playhut*, 85 Cal. App. 4th 927, 933 (2000);
16 *Metro Traffic Control, Inc. v. Shadow Traffic Network*, 22 Cal. App. 4th 853, 859 (1994). Under
17 *Edwards*, the applicable provisions of the Foundry agreements improperly prevent the Individual
18 Defendants from pursuing a lawful business operation (because they bar each from "any" client or
19 customer), and should be deemed invalid as contrary to public policy.

20 Finally, for the same reasons that a claim based on part (i) of this provision cannot be
21 pursued based on the four-year statute of limitations, the statute has also run with respect to part (ii).
22 Because more than five years have passed since each of Messrs. Chen, Jalan, and Szeto left Foundry,
23 Plaintiffs cannot, as a matter of law, pursue a breach of contract claim against any of them. This part
24 of Plaintiffs' breach of contract claim therefore should be dismissed with prejudice.

25 / / /

26 / / /

27 ⁴ That statute provides that "... every contract by which anyone is restrained from engaging in a
28 lawful profession, trade, or business of any kind is to that extent void."

1 **E. Plaintiffs’ Claim for Intentional Interference With Prospective Economic**
2 **Advantage (Count 12) Fails Under Rule 12(b)(6) and Is Time Barred**

3 Under California law, a claim based upon intentional interference with prospective economic
4 advantage must have the following elements: “(1) an economic relationship between the plaintiff and
5 some third party with the probability of future economic benefit to the plaintiff; (2) defendant’s
6 knowledge of the relationship; (3) intentional acts, apart from the interference itself, by defendant
7 designed to disrupt the relationship; (4) actual disruption of the relationship; and (5) economic harm
8 to the plaintiff proximately caused by the acts of defendant.” *Swingless Golf Club Corp. v. Taylor*,
9 No. C 08-05574 WHA, 2009 WL 2031768, at *4 (N.D. Cal. Jul. 7, 2009); *Della Penna v. Toyota*
10 *Motor Sales, U.S.A., Inc.*, 11 Cal. 4th 376, 392 (1995). Plaintiffs’ Complaint fails to allege *any* facts
11 corresponding to these elements. For example, the Complaint fails to allege an economic
12 relationship between Plaintiffs and any others, or that Defendants knew of any such relationships,
13 rendering requisite elements (1) and (2) fatally missing.

14 Furthermore, the vaguely alleged acts upon which the Complaint relies for this count are not
15 independently wrongful, as required by precedent. *See, e.g., Della Penna*, 11 Cal. 4th at 393; *see*
16 *also Accuimage Diagnostics Corp. v. Terarecon, Inc.*, 260 F. Supp. 2d 941, 956 (N.D. Cal. 2003).
17 Here, the Complaint merely alleges that A10 and the Individual Defendants (a) solicited Foundry’s
18 customers in breach of contract; (b) solicited and hired Foundry’s employees in breach of contract
19 and as a result of using and disclosing Foundry’s alleged trade secrets; (c) used and disclosed
20 Foundry’s alleged trade secrets; and (d) denigrated Plaintiffs’ technology, products, and services.
21 (Complaint at ¶ 144). To the extent Plaintiffs are relying on their breach of contract allegations to
22 support this claim for interference, such reliance is improper. As shown above (see, e.g.,
23 Section II.D., *supra*), the breach of contract count must be dismissed. Moreover, even if the breach
24 of contract count were sufficiently alleged, this Court has already held that an alleged breach of a
25 confidentiality and non-solicitation agreement by the defendant to solicit business from plaintiff’s
26 customers cannot state a claim for intentional interference with prospective economic relations.
27 *First Advantage Background Servs. Corp. v. Private Eyes, Inc.*, No. C-07-2424 SC, 2007 U.S. Dist.
28 LEXIS 67941, at *2 (N.D. Cal. Sept. 5, 2007).

1 Plaintiffs' reliance on their trade secret misappropriation count to support this interference
2 count is equally deficient. The trade secret count must be dismissed (*see* section II.C., *supra*) and,
3 therefore reliance upon it in this interference count is misplaced. Thus, element (3) is missing.⁵

4 Further, even if the Complaint adequately alleges separate acts independent of the
5 interference itself to satisfy element (3), this count is still deficient. To state a claim for lost
6 prospective economic advantage, a plaintiff must plead facts that support a reasonable probability of
7 the lost economic advantage. *Kasparian v. Los Angeles*, 38 Cal. App. 4th 242, 271 (1995). A vague
8 claim, under which only undefined acts are purported to interfere with a company's customers, does
9 not support the requirement that a plaintiff suffered actual disruption and damages resulting from
10 such disruption. *Silicon Knights, Inc. v. Crystal Dynamics, Inc.*, 983 F. Supp. 1303, 1311-12 (N.D.
11 Cal. 1997). Here, the Complaint alleges, in conclusory fashion, that Plaintiffs' "relationships with
12 their actual and prospective customers were . . . disrupted." (Complaint ¶ 146.) There are no facts to
13 support even an inference that Defendants' acts caused Plaintiffs to lose customers, how such loss
14 occurred, or how Defendants' acts affected any of Plaintiffs' current customers. *Silicon Knights*,
15 983 F. Supp. at 1312. Indeed, the Complaint even fails to identify any customers affected by
16 Defendants' alleged conduct. Hence, requisite elements (4) and (5) are also missing, demanding
17 dismissal.

18 Moreover, to the extent the interference claim hinges on trade secret misappropriation as the
19 underlying wrongful act, it is preempted by the CUTSA. *See Axis Imex, Inc. v. Sunset Bay Rattan*,
20 *Inc.*, No. C 08-3931 RS, 2009 WL 55178, *5 (N.D. Cal. Jan. 7, 2009) (an intentional interference
21 with prospective economic relationship claim based on trade secrets misappropriation is preempted
22 by CUTSA). This claim should thus also be dismissed with prejudice.

24 ⁵ This claim is also based on Defendants allegedly "denigrating the nature, performance, quality,
25 and capabilities of Plaintiffs' technology, products, and services, as well as the direction of
26 Plaintiffs' businesses and strengths of their prospects." (Complaint at ¶ 144.) The Complaint,
27 however, states no separate, underlying claim for any such alleged wrongful "denigration," nor are
28 there any facts pled that would make any such claim plausible on its face. Indeed, such a claim must
meet the heightened standard of Federal Rule of Civil Procedure 9(b), and the Complaint does not do
so. *See Terarecon, Inc. v. Fovia, Inc.*, No. C 05-4407 CW, 2006 WL 1867734, at *7 (N.D. Cal. Jul.
6, 2006) (holding that false statements underlying a claim for intentional interference with
prospective economic advantage must be pled under the requirements of Rule 9(b)).

1 Plaintiffs' interference claim has also been extinguished by the applicable statute of
2 limitations. Cal. Civ. Proc. Code § 339; *Knoell v. Petrovich*, 76 Cal. App. 4th 164, 168 (Cal. Ct.
3 App. 1999) (interference with prospective business advantage is subject to a two-year statute of
4 limitations). The latest of the allegedly wrongful underlying acts on which this claim is based
5 occurred one year after the latest date that Messrs. Chen, Szeto, or Jalan departed Foundry's employ.
6 As shown above (*see* n. 3, *supra*), Mr. Szeto, the Defendant who stayed the longest, left Foundry in
7 May 2005 and the contract restrictions of Article 7 (Complaint., Ex. A at 3 (¶ 7)) expired one year
8 later. The May 2008 expiry of the applicable two-year statute of limitations presents yet another
9 reason to dismiss this claim, with prejudice.

10 For these reasons, this claim against all Defendants should be dismissed with prejudice.

11 **F. Plaintiffs' Intentional Interference With Contract Claim Fails Under**
12 **Rule 12(b)(6) and is Time Barred**

13 The elements of a California-based claim for intentional interference with contractual
14 relations are: "(1) a valid contract between plaintiff and a third party; (2) defendants' knowledge of
15 the contract; (3) defendants' intentional acts designed to induce a breach or disruption of the
16 contractual relationship; (4) actual breach or disruption of the contractual relationship; and (5)
17 resulting damage." *Swingless*, 2009 WL 2031768 at *4 (N.D. Cal. July 7, 2009). Claims for
18 intentional interference with contracts are subject to a two-year statute of limitations. Cal. Civ. Proc.
19 Code § 339; *Knoell*, 76 Cal. App. 4th at 168 (interference with contractual relations is subject to a
20 two-year statute of limitations).

21 This claim should be dismissed for at least four reasons. First, the Complaint fails to allege
22 sufficient facts to support a breach of contract claim upon which this claim can be based. The
23 contracts at issue in this count are the employment contracts between Plaintiffs and the Individual
24 Defendants. (Complaint at ¶ 151.) However, the Complaint fails to allege any facts showing either
25 that these contracts were breached, or that Plaintiffs suffered any damage from such breaches. *See*
26 Section II.D., *supra*. Consequently, their claim for contractual interference fails. Further, to the
27 extent that this count relies on the assertion that Defendants misappropriated alleged trade secrets
28 (*see id.* at ¶ 152), this count still fails. As shown above (Section II.C., *supra*), the Complaint fails to

1 allege a claim for trade secret misappropriation, and such claim is time barred. Since the Complaint
2 pleads no other independent basis for a claim of interference with contract, *Ashcroft* mandates
3 dismissal.

4 In any event, preemption applies to the extent that the Complaint bases the interference claim
5 upon trade secret misappropriation. *Silicon Image, Inc. v. Analogix Semiconductor, Inc.*, No. C-07-
6 0635 JCS, 2007 U.S. Dist. LEXIS 39599, at *27 (N.D. Cal. May 16, 2007). Finally, the applicable
7 two-year statute of limitations has long since run because the most recent act on which this claim
8 could be based occurred in May 2005. The contract restrictions of Article 7 expired one year later.
9 Thus, the two-year statute of limitations expired for this claim in May 2008.

10 Thus, this claim against all Defendants should be dismissed with prejudice.

11 **G. Plaintiffs' Unfair Competition Claim Fails Under Rule 12(b)(6)**

12 "Unfair competition" under California law refers to "any unlawful, unfair or fraudulent
13 business act or practice and unfair, deceptive, untrue or misleading advertising." Cal. Bus. & Prof.
14 Code §§ 17200 *et seq.* ("UCL"). Although California courts recognize three different varieties of
15 actionable unfair competition—acts that are either unlawful, unfair, or fraudulent (*see, e.g., Cel-Tech*
16 *Commc'ns, Inc. v. Los Angeles Cellular Tel. Co.*, 20 Cal. 4th 163, 180 (Cal. 1999) (quoting
17 *Podolsky v. First Healthcare Corp.*, 50 Cal. App. 4th 632, 647 (Cal. Ct. App. 1996))—the Complaint
18 pleads none of them.

19 In lieu of facts supporting a facially-plausible claim, Plaintiffs have filled their Complaint
20 with conclusory allegations wholly incapable of satisfying Rule 8(a) and 12(b)(6) under *Ashcroft*. *See*
21 Complaint at ¶¶ 156-63; *see also Jackson v. Ocwen Loan Servicing, LLC*, No. 2:10-cv-00711-MCE-
22 GGH, 2010 U.S. Dist. LEXIS 93524, at *12-13 (E.D. Cal. Aug. 20, 2010) (because none of
23 plaintiffs' incorporated claims had been sufficiently pled, the plaintiffs lacked "a predicate
24 'unlawful' action to underlie their UCL claim."). The Complaint's bases for the unfair competition
25 claim virtually mirrors that of their intentional interference with prospective economic advantage
26 and intentional interference with contract claims, which, as explained above, both fail. Moreover, a
27 breach of contract claim is not considered "unlawful" conduct under the UCL. *Accuimage*, 260 F.
28 Supp. 2d at 954 ("While section 17200 has broad application, . . . its scope is restricted to violations

1 of law, not contract.”). Nor are the Complaint’s patent infringement and/or trade secret
2 misappropriation claims legally capable of supporting an unfair competition claim. *See, e.g., Halton*
3 *Co. v. Streivor, Inc.*, No. C 10-00655 WHA, 2010 U.S. Dist. LEXIS 50649, at *11 (N.D. Cal. May
4 21, 2010) (patent infringement claim preempts unfair competition claim); *Digital Envoy, Inc. v.*
5 *Google, Inc.*, 370 F. Supp. 2d 1025, 1035 (N.D. Cal. 2005) (CUTSA claim preempts unfair
6 competition claim). In short, the Complaint fails to plead any unlawful conduct under the UCL.

7 The Complaint’s failures continue with its faulty allegations of any actionable “unfair”
8 conduct. Unfair conduct under the UCL is conduct that “threatens an incipient violation of an
9 antitrust law, or violates the policy or spirit of one of those laws because its effects are comparable
10 to or the same as a violation of the law, or otherwise significantly threatens or harms competition.”
11 *Cel-Tech*, 20 Cal. 4th at 187. Plainly and simply, the Complaint does not allege any harm to
12 competition.

13 The Complaint also falls short as to its claim of fraudulent conduct, which, under the UCL,
14 must satisfy the particularity requirements of Federal Rule of Civil Procedure 9(b). *Kearns v. Ford*
15 *Motor Co.*, 567 F.3d 1120, 1125 (9th Cir. 2009) (“[W]e have specifically ruled that Rule 9(b)’s
16 heightened pleading standards apply to claims for violations of the . . . UCL.”). Plaintiffs’ obligation
17 to plead the “Five Ws” of the fraudulent conduct is even greater under Rule 9(b). The Complaint
18 fails to do so.

19 Thus, this claim against all Defendants should be dismissed under Rule 12(b)(6). Because
20 Plaintiffs’ only claims eligible to underlie this claim are time barred, such dismissal should be with
21 prejudice.

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1 **III. CONCLUSION**

2 For these reasons, Messrs. Chen, Jalan, and Szeto respectfully urge this Court to dismiss all
3 claims against them, and A10 respectfully urges this Court to dismiss all claims other than Plaintiffs'
4 patent infringement claims.

5 Dated: October 11, 2010

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